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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 292

VERNON KAHLA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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---

Petitioner, Vernon Kahla, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 12, 1957.

Opinions Below

The District Court rendered no opinion.

The opinion of the Court of Appeals for the Fifth Circuit, is reported at 243 F. 2d 128, and is printed as Appendix "A", p. 17.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 12, 1957 (R. 198). Rehearing was denied on June 13, 1957 (R. 201). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. May a conviction for violation of 16 U.S.C. 703, be sustained, when the trial court fails to fully and adequately instruct the jury on the statutory law applicable to the cause and fails to instruct the jury on all essential questions of law involved?

2. Did failure of the trial court to instruct jury on all essential questions of law involved amount to denial of petitioner's constitutional rights to be tried by jury and to due process of law?

3. Whether petitioner was denied a fair and impartial trial as a result of failure of trial court to submit to a jury instructions on essential issues of the statute and regulations with which petitioner was charged with violating.

Statute Involved

The statutory provision involved in this case is set out in Appendix "B", p. 20.

Statement of the Case

Petitioner was convicted of six counts of unlawful sale, or possession of *migratory* game birds. The information against him may be summarized as follows:

No. of Information	Date of Offense	Offense	Verdict	Sentence
6305 (R. 2)	11/11/55	Sale of 115 wild ducks	Guilty (R. 8)	6 mos. & $500
	11/11/55	Poss. of 115 wild ducks	Guilty (R. 8)	6 mos. (R. 9)
6306 (R. 11)	11/27/55	Sale of 61 wild ducks	Guilty (R. 12)	6 mos. & $500 (Suspended R. 13)
	11/27/55	Poss. of 61 wild ducks	Guilty (R. 12)	"
6307 (R. 15)	1/ 7/55	Sale of 15 wild ducks	Guilty (R. 16)	"
	1/ 7/55	Poss. of 15 wild ducks	Guilty (R. 16)	"

He was acquitted (R. 18) of the sale of three wild ducks, an offense allegedly committed on January 3, 1955, charged in information No. 6308 (R. 17). All informations were consolidated for trial (R. 5).

The government's *only* witness in its case in chief was Anthony M. Stefano, a criminal investigator of the Department of the Interior, United States Fish and Wildlife

Service (R. 25) who had come to Texas in September, 1954 (R. 26) "to apprehend any market hunting of wild migratory birds . . ." (R. 28). After describing the background of his investigation (R. 27-35) he then described the incident giving rise to the information of which Petitioner was acquitted (R. 36-38).

Information No. 6307

Stefano testified that on January 7, 1955 (R. 39) he purchased 15 ducks for $20 (R. 41). Stefano said he "talked at length" with the Petitioner about the night club business and about "ducks" (R. 40). Mrs. Kahla, according to Stefano, took 15 ducks, plucked and frozen, out of a deep freeze (R. 41). Mr. Kahla placed them in a carton (R. 41). *Stefano did not say to whom he paid the money.*

Information No. 6305

On November 11, 1955, Stefano testified that he received some telephone calls from Mrs. Kahla (R. 42) and, as a result, went to the Kahla home (R. 42-43). He said he "purchased 115 ducks for a total price of $132.25" (R. 44) and that "both Mr. and Mrs. Kahla took the ducks out of the freezer and placed them on the kitchen table" (R. 45). Mrs. Kahla gave him an envelope on which to keep track of the number of ducks involved in the transaction (R. 45). *Stefano did not say to whom he paid the money.*

Information No. 6306

In response to the question, "Then did you next purchase 61 wild ducks from Vernon Kahla on November

the 27th," Stefano replied, "Yes, sir" (R. 45). He said that both Mr. and Mrs. Kahla "took the ducks out of the deep freeze" and that he "paid $76" (R. 46). *He did not say to whom he paid this money.*

Although Stefano said he came to Galveston to "apprehend any market hunting of wild migratory birds" (R. 28), he nowhere described the "wild ducks" involved in the above transactions as *"migratory"*. Although there was some reference to the sale of ducks (R. 119, 121, 122, 124) during the testimony of Mrs. Kahla (R. 119-126), the birds *were never identified as migratory*. The Petitioner testified at length (R. 64-114, 116-118) about his association with Stefano, but his testimony does not identify the birds in question as migratory. *On the two occasions when he was asked in cross-examination whether he had migratory game in his possession* (R. 112), *he denied the allegations or said he could not remember.*

No proof was offered as to the provisions of any Regulations promulgated under authority of the Migratory Bird Treaty Act (16 U.S.C. 703); the Court was *not* asked to take judicial notice of such regulations.

Instructing the jury, the Court stated that the jurors were the sole judges of the evidence (R. 178), discussed the law regarding credibility of witnesses (R. 178-179), explained his power to comment on the evidence (R. 179-180), mentioned the presumption of innocence and the burden of proof (R. 180), defined reasonable doubt (R. 180-181), explained the consolidations of the informations (R. 181-182), explained that the informations were not evidence (R. 182), and discussed entrapment (R. 184-188).

The statute under which the prosecution was brought was *not* read to the jury, the jury was *not* advised of the provisions of any regulations promulgated under such statute, and the jury was *not* advised that the birds or ducks in question *must be migratory* if the Petitioner was to be convicted of their possession or sale. The jury was *not* advised of the elements of the offenses charged.

The trial court stated, "in considering your verdict, it will not be necessary for you to concern yourself with whether or not the exact number of ducks was shown to have been sold, or the defendant to have had them in his possession on exactly the day charged, because that is no longer an issue before you. That is conceded by the defense. The only real issue with which I believe you are concerned now, is as to whether, in fact, the facts show Mr. Kahla to have been entrapped into these unlawful acts." (R. 183-184).

For the jury to determine whether Petitioner was guilty of the offenses with which he was charged, it was necessary for them to be instructed by the Court as to what constituted a violation by Section 703, Title 16, U.S.C. Otherwise it was impossible to determine whether the violations made spelled out a criminal offense under the cited Federal Statute.

The Regulations cited in Section 703, Title 16, U.S.C. were *not* put in evidence. The Statute itself, Section 703, Title 16, U.S.C., was *not* put in evidence. Neither did the instructions purport to explain the elements of the substantive offense which were required to be found in order to permit Petitioner to be found guilty.

The jury was never given an explanation of the offense charged, but was simply told that if they found certain

enumerated facts, the verdict must be one of guilty; if they did not so find the existence of such facts, the verdict must be one of not guilty. In essence, the instruction given by the Court below was a reservation of the law to the Court and admonishing the jury that the law applied in a certain manner defined by the Court to sets of conditions and facts which the jury might or might not find.

The only instruction by the Court was that the Petitioner was charged "under four separate criminal informations, and three of those four each contained two counts, the fourth containing a single count. Hence there are in all, seven definite charges upon which Mr. Kahla is now on trial . . . They dealt with definite instances, definite times, definite numbers of ducks, but we have consolidated them here for trial." (R. 181) The Court further instructed (R. 183-184):

> "The only real issue with which I believe you are concerned now, is as to whether, in fact, the facts show Mr. Kahla to have been entrapped into these unlawful acts."

The jury was told to determine only whether there was entrapment and if they did not, a verdict of guilty should be returned. Hence, the jury was instructed that they had to consider *no* other issue than that of entrapment, the jury being left to determine for itself the important question of law as to whether proof of all of the elements of the crime charged was established by the government.

The jury was given no hint of law, or of the elements of the substantive crime that it must find as fact before a verdict could be returned against Petitioner.

After receiving the inadequate instructions, the jury found Petitioner guilty (R. 8). Petitioner was sentenced to imprisonment for 6 months, and fined the sum of $500.00 (R. 9-10).

Upon appeal, the Court of Appeals for the Fifth Circuit affirmed (R. 194-197; 198; 243 F. 2d 128). It held, inter alia that it was not necessary for the trial court to explain the statute with which Petitioner was charged with violating and that it was unnecessary to define the offense charged as well as to explain the regulations cited in Section 703 Title 16, U.S.C.

Reasons for Granting the Writ

1: This case presents an issue of general importance in all Federal criminal trials where a jury is invoked to pass upon the innocence or guilt of a defendant. That issue is whether a trial judge must instruct the jury on all essential questions of law involved, whether or not it is requested to do so; whether the court may bypass such procedure and go forward with the trial, leaving the jury to determine the guilt or innocence based upon conjecture instead of legal proof and adequate instructions. The latter procedure was followed at Petitioner's trial, and was sustained by the decision below.

The court's instruction that it was not necessary for the jury to consider any of the facts except entrapment "because that is no longer an issue before you" (R. 183) amounted to an instruction to find Petitioner guilty of the other elements of the offenses, although, "* * * it is not competent for the Court, in a criminal case, to instruct the jury peremptorily to find the accused guilty

of the offense charged * * *." *Sparf v. U. S.*, 156 U.S. 51, 105.

> "By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to." *U. S. v. Taylor*, 11 Fed. 470, 474, cited in *Sparf v. U. S.*, supra, 156 U.S. 51, 105-106.

> "* * * A judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood, etc. v. U. S.*, 330 U.S. 395, 408.

The sole question is whether, wholly apart from constitutional matters, the trial court's charge properly explained to the jury what Sec. 703, Title 16, U.S.C. condemns. The conclusion that he did not do so requires no labored argument. On the basis of the instructions, the jury found, that Petitioner had committed acts violative of this statute, and was accordingly found guilty. Such a construction of the statute employed by the trial court without inclusion of the basic constitutional element of the offense was serious and prejudicial error. The following decisions appear to be decisive. *Christoffel v. U. S.*, 338 U.S. 84; *United Brotherhood v. U. S.*, 330 U.S. 395; *Boltenbach v. U. S.*, 326 U.S. 607; *Screws v. U.S.*, 325 U.S. 91.

Like all other persons in Federal criminal cases, Petitioner was entitled to a trial by jury, U. S. Const. Art. III, Sec. 2: Amendment VI. For the trial court to determine for itself the issue of guilt amounted to a denial of Petitioner's constitutional rights to be tried by jury and to due process of law. U. S. Const. Amendment VI; cf. *Tot v. U. S.*, 319 U.S. 463; *Horning v. District of Colum-*

bid, 264 U.S. 135; *Berra v. U. S.*, 351 U.S. 131; *Stevenson v. U. S.*, 162 U.S. 313.

Entrapment does not constitute admission of facts upon which prosecution is based. *Sorrels v. U. S.*, 287 U.S. 435, 452.

This defense was raised by plea of not guilty.

The duty of the trial court to give to the jury a definition of the crime and the elements thereof, is well established. *Bird v. U. S.*, 180 U.S. 356, 361. And the rule recognizing that the jury must be instructed as to all of the essential elements of the crime is universally noted. *Christoffel v. U. S.*, 338 U.S. 84, 89.

The principle adopted by the trial court was to transfer its function in giving the law and stating the essential elements of the offense charged; to the jury. This court has repeatedly held that "* * * guilt is determined by the jury, not the court." *Bollenbach v. U. S.*, 326 U.S. 607, 613.

Moreover, instructions *"should be clear and understandable, whether they purport to define issues of fact or to state the law applicable to a particular situation. They should be definite and certain, as applied to the facts of the case at bar, leaving nothing to inference. They should be intelligible, free from obscurity, involvement, ambiguity, metaphysical intricacy and doubt. The language of an instruction should be so plain that no doubt can arise as to its meaning, and that there is no chance of misunderstanding."* 53 Am. Jur., "Trial," Sec. 545, p. 434. *"A conviction ought not to rest on an equivocal direction to the jury on a basic issue."* *Bollenbach v. U. S.*, 326 U.S. 607, 613; *Krauss Bros. v. U. S.*, 327 U.S. 614, 627. (Emphasis supplied)

If error in failure to submit issues to the jury may be thus easily sloughed off, then the Constitutional right to jury trial is in great peril. Tumey v. Ohio, 273 U.S. 510, 533. While the jury might have decided to disbelieve Stefano, or might have decided that his recitations from the witness stand were accurate (although we contend *there was no substantial evidence to support this conviction*) and so have resolved the issues of fact in favor of the government, Petitioner was nevertheless entitled to have the question fairly presented to the jury and not decided by the prosecutor. *Malaga v. United States*, 1 Cir. 57 F. 2d 822, 826.

The gravity of the error here involved is stressed in *Screws v. United States*, 325 U.S. 91, 107:

> "Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

This right is so fundamental and so respected as frequently to require reversal even in situations much less questionable than that here involved. In *Morris v. United States*, 9 Cir. 156 F. 2d 525, a case involving an indictment charging violation of the Emergency Price Control Act of 1942 and Maximum Price Regulations, the Court said (p. 528):

> "The jury was never given an explanation or definition or enacted text of the offense charged, but instead were told that if they found certain enumerated facts, the verdict must be one of guilty; otherwise the verdict must be one of not guilty. A jury's duty cannot be

> so limited by a Judge. There is no better grounded instruction than the one used in every criminal jury trial, including this one, that the court gives the law to the jury and the jury applies it to the facts. Here, by the instruction, quoted, the judge reserved the law to himself and told the jury that the law applies in a certain manner defined by him to sets of facts which the jury may or may not find."

In *United States v. Levy*, 3 Cir. 153 F. 2d 995, which involved a similar violation as that in the *Morris* case, supra, the Court said (p. 998):

> "In the instant case the trial court's instructions to the jury did not contain the text of the applicable statute. They included no definite information as to the offense charged. Neither the provisions of the Price Control Act, the regulations under it, nor the substance of either ever reach the jury. The court and counsel of both parties were thoroughly acquainted with the law which the defendant was accused of violating, but there is nothing in the record showing that the jury was ever informed as to such prime requisite * * *.
>
> "The case appears to have been tried to the jury upon the inadvertent assumption of both the court and counsel that if the whiskey was sold above a certain price, the sale would be illegal. But the basis for the illegality was never given the jury.
>
> "It was error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated by the defendant on trial and impels the reversal of the judgment. Reversed."

The absence of request for instructions on the points dwelt upon does not defeat the appeal because:

> "In a criminal case it is always a duty of the court to instruct on all essential questions of law, whether requested or not.".
>
> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion." *Screws v. U. S.*, 325 U.S. 91, 107.

It is settled law that the Court must instruct sua sponte on administrative regulations and must explain the statutes. Such cases as *United States v. Noble*, 3 Cir. 155 F. 2d 315; *United States v. Levy*, 3 Cir. 153 F. 2d 995, 998, hold that reference to the indictment or the information is *not* enough to call the jury's attention to the law applicable.

Thus, there can be no mistaking the mandatory duty imposed upon the trial judge to define the offense to the jury as well as to inform it of all the essentials of the crime charged.

There is a square conflict between the decisions of this court such as *Christoffel v. U. S.*, 338 U.S. 84 and *Screws v. U. S.*, 325 U.S. 91, and the decision below, which is, in effect, a holding that the fundamental right to be convicted of crime only on proof of all of the elements of the crime charged may be disregarded, with no real consideration, in the trial court's discretion.

The procedure adopted by the courts below is in square conflict with that required by decisions of this court as well as by decisions of other Circuits. The number of cases involving this well-established principle is sufficient to demonstrate the importance of a definitive statement by this Court. The writ of certiorari should be granted.

2. This case presents the all-important issue of the requisites for a "fair" criminal trial, in the context of the Trial Judges's duty to instruct the jury on all essential questions of crime involved, whether or not it is requested to do so, and to define the offense with which a Defendant is charged in clear and simple terms.

The record of this trial shows that the Trial Judge failed to identify the substantive offense as a violation of Title 16, Section 703. Likewise, this statute was not explained to the jury nor were the regulations, cited in this particular statute, defined or even referred to. Instead, the court itself determined the issue of guilt with respect to the violation of this statute, and put to the jury the sole consideration as to whether entrapment existed.

This action infringed on the power of the jury to deliberate free from legal fetters, and hobbled the jury's power to arrive at a verdict as to the guilt or innocence of Petitioner.

The action of the trial court in failing to define the essential elements of the crime with which the Petitioner was charged amounted to a denial of Petitioner's constitutional rights to be tried by a jury and to due process of law. Knowledge of the essential elements of the crime charged was not made available to the jury by the trial judge, with the same degree of lucidness and precision that the due process clause requires in the enunciation of the elements of a criminal offense.

U. S. Const. Amend. VI; Amend. V; cf. Tot v. United States, 319 U.S. 463;
Horning v. District of Columbia, 254 U.S. 135, 138;
Berra v. United States, 351 U.S. 131;
Stevenson v. United States, 162 U.S. 313.

The "vice of vagueness" (*U. S. v. Josephson*, 165 F. 2d 82, 85) which must be avoided in all instructions to a jury deliberating in a criminal case, seemed to have held sway in the trial court.

This issue received short shrift from the Court below.

The issue as to whether the basic and highly prejudicial error constitutes denial of Petitioner's constitutional rights to be tried by jury and to due process of law is one of general importance; there is need for this Court to reaffirm the rule laid down in *Christoffel v. U. S.*, 338 U.S. 84, 90, that it was a "fundamental right," - "to be convicted of crime only on proof of all the elements of the crime charged * * *."

The teaching of Christoffel was clearly not followed by the Courts below. This Court should exercise its supervisory jurisdiction over the administration of Federal criminal justice, by reviewing this conviction, and reaffirming the principles of the *Christoffel* case.

In addition to contravening Christoffel, the decision below is in square conflict with that of other circuits on the specific issue as to the requirement that the Trial Judge give to the jury a definition of the crime and the elements thereof. While the Court below, in effect, held that this was not so required, the Court of Appeals for the Third Circuit and the Ninth Circuit have expressly held the contrary. *U. S. v. Noble*, 155 F. 2d 315, and *Morris v. U. S.*, 156 F. 2d 525.

The square conflict between the decision below and the *Noble* and *Morris* cases can be resolved only by this Court. The issues are of obvious importance, not only to the administration and enforcement of this particular statute, but to the general criminal law.

Failure to so instruct the jury constitutes prejudicial and fatal error. Conviction, and the affirmance of such conviction, are in obvious and direct conflict with the fundamental principles elaborated by this Court in *Christoffel v. U. S.*, 338 U.S. 84 and *Screws v. U. S.*, 325 U.S. 91, and in conflict with other principles of law. This Court should not withhold its review from such judicial procedures.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16315

VERNON KAHLA, *Appellant*

VERSUS

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

(April 12, 1957)

Before HUTCHESON, Chief Judge, and BORAH and TUTTLE, Circuit Judges.

HUTCHESON, Chief Judge: Tried to a jury for, and convicted of, unlawful sale and possession of migratory game birds, defendant has appealed on a record devoid of objection or exception to any ruling of the trial court.

Realizing the heavy burden placed upon him, appellant, appearing here through different counsel from those he had below, invokes the well settled principle, that, though

no motion for a directed verdict was made and no exception of any kind was taken and preserved below, where the record shows fundamental errors affecting the constitutional right of a trial by jury, they may, indeed must, be relieved against.

The fundamental errors thus claimed are: (1) that the court failed to fully and adequately instruct the jury on the law of the case; and (2) the government failed to prove by clear, convincing, and unequivocal evidence the essential ingredients of the offenses charged, and the evidence was insufficient to sustain the conviction.

Pointing, in support of his first ground, to the fact that the charge of the court did not set out in full or in substance the statute under which the informations were filed, nor did it instruct the jury as to the elements of the offenses therein charged, appellant urges upon us that, by stating to the jury that the only disputed issue in the case was whether the defendant had been entrapped into committing the offenses charged, the court denied the defendant a trial by jury and, invading its province, in effect instructed a verdict against him.

In support of his second ground, he insists that the record will be searched in vain for competent proof that the birds were migratory and that he committed the offenses charged.

On its part, the United States, in reply to the contentions that the evidence was insufficient to support the verdict and judgment of guilty, insists that not only is the government's evidence of the defendant's guilt overwhelming, but the defendant himself, taking the stand and admitting the possessions and sales as charged and found, based his defense solely and entirely upon the claim that

he was entrapped by undercover agents of the government, and the jury on full and ample evidence found against him on this defense.

In reply to the claims that, by the failure of the court to charge all the elements of the offense with which defendant was charged, appellant was denied due process of law, appellee urges upon us that the cases on which appellant relies hold no more than that in criminal cases it is the duty of the court to instruct on essential questions or issues whether requested to do so or not. So urging, it points to the record showing: that there was no objection made to the charge as given and no request made for additional instructions; that the defendant in his testimony and his counsel in his argument to the jury affirmed, that the defendant did not deny possessing ducks and selling them to the undercover agent; and that his claim that he was not guilty was based not on the claim that he did not possess and sell ducks but that he was entrapped by the agent into doing so, and, therefore, he was not in law guilty of the offense with which he was charged. Henderson v. United States, 237 F (2) 169.

In reply to the claim that the government's proof failed to make out a case against defendant, appellee points to not only the testimony of the government's witnesses but to that of the defendant and his wife, that he had possessed and sold ducks and that he did this under the malevolent and wrongful persuasion and inducement of the government itself, and to the verdict of the jury rejecting his defense as unfounded. So pointing, he urges upon us that the appeal on the grounds put forward is wholly unmeritorious, indeed frivolous, and that, no fundamental or substantial error appearing, the judgment should be affirmed.

While we agree with appellant that the principle he invokes is a sound and wholesome one which, when applicable, has been uniformly respected and applied in this court, we agree with appellee that upon the undisputed facts of record it is wholly inapplicable here, where the evidence fully supports the verdict, and the court's charge to the jury followed, was in precise accordance with, and gave full effect to, the position deliberately taken by the defendant and his counsel below, and such position so taken cannot be departed from here. cf. Bowen v. United States, 192 F (2) at p. 517; Voltz v. United States, 196 F (2) at 299.

The judgment is, therefore, AFFIRMED.

APPENDIX "B"

Statute Involved

Title 16, Section 703.

"Unless and except as permitted by regulations made as hereinafter provided in Sections 703-710 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase; deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included in the terms of the conventions between the United States and Great Britain for the

protection of migratory birds concluded August 16, 1916 (39 Stat. 1702); and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936. July 3, 1918, c. 128, §2, 40 Stat. 755; June 20, 1936, c. 634, §3, 49 Stat. 1556."

APPENDIX "C"

Judgment

Extract from the Minutes of April 12, 1957.

VERNON KAHLA

versus

UNITED STATES OF AMERICA

No. 16315.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.